



**PennState**  
Dickinson Law

**DICKINSON LAW REVIEW**  
PUBLISHED SINCE 1897

---

Volume 39  
Issue 2 *Dickinson Law Review* - Volume 39,  
1934-1935

---

1-1-1935

## Constructive Desertion As a Ground for Absolute Divorce in Pennsylvania

E.M. Buchen

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlra>

---

### Recommended Citation

E.M. Buchen, *Constructive Desertion As a Ground for Absolute Divorce in Pennsylvania*, 39 DICK. L. REV. 112 (1935).

Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol39/iss2/4>

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact [lja10@psu.edu](mailto:lja10@psu.edu).

# Dickinson Law Review

---

Published October, January, April and June by Dickinson Law Students

---

Volume XXXIX

JANUARY, 1935

Number 2

---

Subscription Price \$1.50 Per Annum

50 Cents Per Number

---

W. H. WOOD, *Editor-in-Chief*

EDWIN M. BLUMENTHAL, *Business Manager*

*Assistant Editors*

ALBERT H. ASTON, Note Editor  
JOSEPH L. KRAMER, Law Journal Editor  
JESSE P. LONG, Decision Editor  
J. WESLEY OLER, Literary Editor  
JAMES RICK, 3RD., Book Review Editor

*Assistant Managers*

J. RICHARD BUDDING  
MYRON D. HOCKENBURY  
ROBERT L. JACOBS  
DONALD S. MILLS  
GLENN E. THOMSON

HAROLD S. IRWIN, *Faculty Editor*

JOSEPH P. McKEEHAN, *Faculty Manager*

---

## NOTES

### CONSTRUCTIVE DESERTION AS A GROUND FOR ABSOLUTE DIVORCE IN PENNSYLVANIA

Constructive desertion has been defined as one where a spouse intentionally brings the co-habitation to an end by misconduct which renders the continuance of the marital relations so unbearable that the other leaves the family home.<sup>1</sup> Whether, in such a situation, the spouse who leaves the home can secure a divorce for desertion is a moot question in Pennsylvania, and an examination of the cases shows apparent authority on both sides of the problem.

The Pennsylvania Divorce Act<sup>2</sup> provides that the innocent and injured spouse may obtain a divorce *a vinculo* when the other spouse "shall have committed wilful and malicious desertion, and absence from the habitation of the injured and innocent spouse, without a reasonable cause, for and during the space of two years." There is nothing in this language to indicate

---

<sup>1</sup>19 C. J. 61.

<sup>2</sup>Act of May 2, 1929, P. L. 1237, sec. 10 (d); 23 P. S., sec. 10 (d).

whether or not it was the intention of the legislature to include constructive desertion under the head of desertion. An examination of the law as to when a spouse is justified in leaving the other spouse would seem to answer our question in the negative.

The attitude of the courts on this problem of justification, at least, is perfectly clear, and all the cases are in accord. The rule is well stated in *Mendenhall v. Mendenhall*,<sup>3</sup>

"Separation is not to be tolerated for light causes, and all causes are light which the law does not recognize as ground for the dissolution of the marriage bond."<sup>4</sup>

It is felt in some quarters that the rule, as so expressed, has been modified and made less stringent by the recent case of *Krebs v. Krebs*,<sup>5</sup> wherein it was held that a wife was not a deserter when she left the marital home under "dire compulsion." The better view, however, as supported by the many prior cases is that, by the phrase "dire compulsion," the court meant such "compulsion" as would amount to either cruel and barbarous treatment or indignities to the person, both of which are grounds for divorce, so that the rule stands unimpaired.

The logical implication of this statement of the law is that there is no need for the doctrine of constructive desertion in the law of Pennsylvania. If a spouse is not justified in leaving the other unless that other's conduct constitutes a ground for divorce, there is no reason, seemingly, why the spouse leaving should not obtain the divorce on the ground because of which he or she left the common home. Unfortunately, however, an examination of the Pennsylvania cases indicates conclusively that the judicial mind does not operate as directly as this.

There are a number of Pennsylvania cases to the effect that constructive desertion is not a ground for divorce, as is illustrated in *Creegan v. Creegan*,<sup>6</sup> where the court in discussing the merits of the libellant's case said,

"Manifestly as its maximum his case presents nothing but possibly constructive desertion, which will not answer his purpose. The desertion

---

<sup>3</sup>12 Pa. Super. Ct. 290 at 296.

<sup>4</sup>See also *VanDyke v. VanDyke*, 135 Pa. 459; *May v. May*, 62 Pa. 206; *Detrick's Appeal*, 117 Pa. 452; *Howe v. Howe*, 16 Pa. Super. Ct. 193; *Strang v. Strang*, 11 D. & C. 300; *Butler v. Butler*, 1 Pars. Eq. Cas. 329.

<sup>5</sup>109 Pa. Super. Ct. 175. This view is further upheld by the recent statement of the Superior Court in *Scholz v. Scholz*, 173 A. 761, at p. 763, "It is a recognized rule that where the respondent attempts to justify her desertion by setting up cruel and barbarous treatment and indignities to the person, the burden of proof is upon the respondent who sets up these charges to establish by the preponderance of the evidence a state of facts that would entitle her to a decree of divorce on such grounds."

<sup>6</sup>34 Lack. 203.

which warrants a dissolution of the marriage tie must be actual as well as wilful and malicious."

To the same effect, and probably the inspiration for the statement above is the case of *Ingersoll v. Ingersoll*.<sup>7</sup> In further accord with this view we find the statement of the Superior Court:<sup>8</sup>

"But it is urged that this was a constructive desertion, a *term unknown to our law*."

These statements are representative of the earlier attitude of the courts.

On the other side of the picture there are a number of lower court cases which, although not directly concerned with this point, use language intimating that a divorce would be granted for constructive desertion. It is in *Howe v. Howe*,<sup>10</sup> a Superior Court case, that we find a direct holding on the point, in the language of Orlady, judge,

"If the husband's conduct is so cruel toward his wife that she cannot live with him in safety to her health or without peril to her life, and for such reason she leaves him and abandons his home, she does not thereby commit the crime of desertion. In such a case, she does not leave her husband or his home in consequence of any wilfulness on her part, but is compelled by the cruelty of the husband and against her will to do so. The desertion in such case is upon his part and not upon hers. He as completely commits the crime of desertion when by his cruel conduct he compels her for safety to leave him and his home as when he wilfully and without cause abandons her."<sup>11</sup>

While this statement appears to be conclusive, again we are apparently deposited on the other side of the fence by the opinion of the Superior Court in *Young v. Young*.<sup>12</sup> In this case, the husband, because of the wife's cruelty, left her and brought suit for divorce on the ground of desertion. The lower court<sup>13</sup> followed *Howe v. Howe*,<sup>14</sup> and granted the divorce. The Superior

<sup>7</sup>48 Pa. 249; see also *Smith v. Smith*, 4 Dist. 397 upholding this view.

<sup>8</sup>*Hartner v. Hartner*, 75 Pa. Super. Ct. 342 (italics added).

<sup>9</sup>*Pritts v. Pritts*, 5 D. & C. 23, "where the libel avers desertion, cruel and barbarous treatment, indignities to the person, and, in a prior action, a divorce had been refused on the last two grounds, it will be refused again as to these grounds; but where the charge of constructive desertion is proved, a divorce will be granted." For statements to the same effect see *Miller v. Miller*, 9 Berks 145; *Reber v. Reber*, 5 Berks 237.

<sup>10</sup>16 Pa. Super. Ct. 193.

<sup>11</sup>*Idem*, at p. 198. In accord see *Krebs v. Krebs*, 31 Sch. 154; *Legrand v. Legrand*, 24 Dist. 244; *Young v. Young*, 2 D. & C. 777.

<sup>12</sup>82 Pa. Super. Ct. 492. This is the appellate decision in *Young v. Young*, 2 D. & C. 777 cited in Note 11.

<sup>13</sup>Cited in Notes 11 and 12.

<sup>14</sup>Cited in Note 10.

Court, however, reversed, saying that the husband has a specific remedy, namely, cruel and barbarous treatment or indignities to the person, to which he must appeal if he would have relief.<sup>15</sup>

An attempt might be made to reconcile the cases on the ground that in *Howe v. Howe* the wife was suing for the divorce, while in *Young v. Young* it was the husband who brought suit. Any significance which might attach to this fact is dispelled, however, by the language of the court in *Caldwell v. Caldwell*.<sup>16</sup>

"The law makes no distinction between persons sui juris, and facts which established desertion as to one must apply with equal force to the other."

Also in *Davis v. Davis*,<sup>17</sup> the rule of *Young v. Young* was applied to the situation where the wife left and subsequently brought suit for the divorce.

The reason for the decision in the *Young* case is clearly contained in the following excerpt,

"The other view of the case would make it practicable in every instance where a husband had a cause for divorce because of cruelty or indignities to proceed by libel for desertion and thereby avoid the liability to which he might be subjected for the payment of alimony."<sup>18</sup>

This provision for the payment of alimony to the wife where the husband secured a divorce for cruelty or indignities was contained in the Act of May 8, 1854 as amended by the Act of June 25, 1895,<sup>19</sup> and in the light of it, it is possible to distinguish the two cases on a plausible ground. Since the decision in *Young v. Young*, however, the above mentioned statutory provision has been repealed by the Act of April 4, 1925,<sup>20</sup> and, consequently, it is no longer possible for the wife to receive permanent alimony in such cases.<sup>21</sup> Accordingly, since the reason for the decision no longer exists, there remains no good reason why its precedent should be followed by later cases.

Since the case of *Young v. Young*, there have been no Superior Court cases directly involving the problem. Regardless of how that court may decide when a case does arise, the fact remains that the lower courts have and frequently do grant divorces for constructive desertion.<sup>22</sup> As we have

---

<sup>15</sup>82 Pa. Super. Ct. 492 at 496. Accord; *Carey v. Carey*, 13 D. & C. 193.

<sup>16</sup>70 Pa. Super. Ct. 332 at 336.

<sup>17</sup>71 Pitts. 681.

<sup>18</sup>82 Pa. Super. Ct. 492 at p. 496 (italics added).

<sup>19</sup>Act of May 8, 1854, P. L. 644, as amended by the Act of June 25, 1895, P. L. 308.

<sup>20</sup>Act of April 4, 1925, P. L. 124.

<sup>21</sup>See *Epstein v. Epstein*, 93 Pa. Super. Ct. 398 at p. 404, which holds that since the Act of 1925 (see Note 20 supra) it is unnecessary for the courts to consider the question of permanent alimony in this type of case.

<sup>22</sup>*Clark v. Clark*, 24 Dist. 475; *Boccutti v. Boccutti*, 49 Mont. 136; *Crumpton v. Crumpton*, 68 Pitts. 576; *Rinewalt v. Rinewalt*, 37 Mont. 148; *Johnson v. Johnson*, 27 Dist. 1014.

seen above,<sup>23</sup> a spouse is not justified in leaving the common home unless the other spouse's conduct has been such as to constitute a ground for divorce. However, this does not lead to the conclusion that a divorce may be obtained for desertion in every instance where a spouse has justifiably left the home.<sup>24</sup> Just what further element or elements is required is not made clear by some of the cases,<sup>25</sup> but several well-considered opinions point out clearly that there must be shown an "intent" to desert on the part of the guilty spouse; that is, a "wilful and malicious" desertion. The importance of this element of intent is well illustrated by the following excerpt,<sup>26</sup>

"The husband's conduct in order to render the wife's withdrawal from him, desertion by him, not only must constitute the very reason for her withdrawal, but must be such as to point to intent on his part to compel her to withdraw."

In other words, the guilty spouse's conduct must amount not only to a ground for divorce, but, further, must be calculated to cause a withdrawal from the home by the other spouse, and consequently an abandonment of marital relations.

As has been said above, what the attitude of the Superior Court will be upon this problem in the future is uncertain. As a conjecture, in view of the number of lower court cases upholding constructive desertion and in view of the fact that there is no reason why the rule of *Howe v. Howe*<sup>27</sup> should not be followed, it is probable that divorces will be granted in the situation known as constructive desertion.<sup>28</sup> It is improbable, however, that the term

---

<sup>23</sup>See Notes 3 and 4 *supra*.

<sup>24</sup>In this connection see *Rinewalt v. Rinewalt*, 37 Mont. 148, where the guilty party committed adultery in the home, as a result of which the innocent spouse left. The court remarks that if the wrongful act had been committed outside the home, the libellant could have sued successfully only on the ground of adultery. Cf. *Kershaw v. Kershaw*, 5 Dist. 551, where the adultery occurred outside the home, in accord with this view of *Rinewalt v. Rinewalt*.

<sup>25</sup>See cases cited in Note 22.

<sup>26</sup>*Diehl v. Diehl*, 5 Berks 190. For similar statements see *Schildt v. Schildt*, 4 Berks 41; *O'Keefe v. O'Keefe*, 69 Pitts. 235.

<sup>27</sup>Cited *supra* note 10. The case of *Krebs v. Krebs*, 109 Pa. Super. Ct. 175, which is a late decision, definitely upholds *Young v. Young* as correct law, but this, as we have endeavored to show, *supra*, seems erroneous. This result is probably due to hasty approval of the holding of the *Young* case without a careful examination of the reason therefore.

<sup>28</sup>An important practical result of applying the doctrine of constructive desertion is seen in the following situation. Suppose the husband commits adultery in the marital domicile. The wife then leaves. A year later she commits adultery. Later she sues for a divorce on the ground of adultery. Her own adultery is a defence to this action. See *Act of May 2, 1929, P. L. 1237*, sec. 52. However, if she brought her suit on the ground of desertion, her adultery would not be a defense and she could secure a divorce. See *Mendenhall v. Mendenhall*, 12 Pa. Super. Ct. 290, in which the court said, "Adultery itself by a libellant after desertion by the respondent does not deprive the libellant to his right to a decree for desertion." In accord see *Ristine v. Ristine*, 4 Rawle 459. Another example of where application of the doctrine has

"constructive desertion" will be used because of the statement of the Superior Court which we have quoted from *Hartner v. Hartner*.<sup>29</sup> All the signposts indicate that constructive desertion will continue as a part of Pennsylvania law, but that it will be known simply as "wilful and malicious desertion."

E. M. Buchen.

## PRESENT STATUS OF THE PAROL EVIDENCE RULE IN PENNSYLVANIA

This note is limited to a general discussion of the present parol evidence rule as contrasted with previous decisions in which the rule was enlarged by the addition of the so-called "contemporaneous parol agreement" exception. The rule has so many specific applications and exceptions that it would be impossible to deal with all of them here, and consequently only the general rule and the aforesaid one main exception will be considered.

The general common law rule as stated in *Corpus Juris*<sup>1</sup> is :

"When any judgment of any court, or any other judicial or official proceeding, or any grant or other disposition of property, or any contract, agreement, or undertaking has been reduced to writing, and is evidenced by a document or series of documents, the contents of such document can not be contradicted, altered, added to, or varied by parol or extrinsic evidence."

Another expression of the rule as applied by the Pennsylvania courts is :

"The writing thus becomes the expression of the final result of the negotiations between the parties and is the best and only evidence of the transaction, all preliminary agreements and conversations being presumed to have been merged in such writing, and parol evidence to contradict or vary its terms is therefore inadmissible."<sup>2</sup>

Although the old common law rule was very strict as is shown by the statement of the law from *Corpus Juris*, and was practically the same as the present Pennsylvania view, the earlier Pennsylvania courts were much more liberal in allowing the admission of parol evidence. There was no necessity

---

practical significance is in the situation where the wife leaves the home because of the cruel and barbarous treatment of her husband. If she asks for a divorce on the ground of desertion, the husband might show as a valid defence that he had made an offer to take her back; *Kumiker v. Kumiker*, 94 Pa. Super. Ct. 257. On the other hand, if she brought suit on the ground of cruelty, the offer to take her back would not be a defence.

<sup>29</sup>Cited *Supra* in Note 8.

---

<sup>1</sup>22 *Corpus Juris* 1070.

<sup>2</sup>Henry, *Penna. Trial Evidence*, p. 381.